STATE OF LOUISIANA	*	**NO. 2002-KA-1390**
VERSUS	*	**COURT OF APPEAL**
ERIC A. PETERSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 412-224, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Max N. Tobias, Jr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, Judge Max N. Tobias, Jr.)

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AFFIRMED

The defendant, Eric A. Peterson ("Peterson"), was charged by bill of information on 26 January 2000 with possession of cocaine with intent to distribute, a violation of La. R.S. 40:967(A). At his arraignment on 9 February 2000, he pleaded not guilty. After a hearing on 5 June 2000, the trial court found probable cause to substantiate the charges, bound the defendant over for trial, and denied the defendant's motion to suppress the evidence. After a two-day trial held on 4 and 5 April 2002, a twelve-member jury found the defendant guilty as charged. He was sentenced on 1 July 2002 to serve five years at hard labor. The trial court recommended Peterson for the Department of Corrections' IMPACT Program. His motion for an appeal was granted.

STATEMENT OF FACTS

On 5 January 2000 about 1:30 p.m., Officer Jeffrey Keating began a surveillance of a house at 8933 Olive Street in New Orleans in order to determine if the target of his investigation was inside the house. The officer observed a white car parked in front of the residence. A young man walk toward the porch. Just then, Peterson emerged from the house, and the men

spoke. The visitor handed Peterson currency and received a small object in exchange.

Detective Paul Noel executed a search warrant of the house at 8933 Olive Street shortly after 1:30 p.m. on 5 January 2000. After knocking on the door and receiving no answer, he and other officers forced open the door into the residence. Peterson was found in the second room of the house, which was a bedroom. Next to the defendant was a loaded SKS assault rifle. Found in a jacket pocket was a clear, plastic bag containing forty individually wrapped rocks in small, clear bags. Four individually packaged pieces of crack cocaine were found inside a shirt pocket; the shirt was hanging in a closet. The police also found $1,087.00 in cash and a scale. Peterson was arrested, and several pieces of mail containing his name and address found in the house were confiscated. Clothing for a heavyset man, like Peterson, was found throughout the house.

The parties stipulated that the rock-like substances found in the house were tested and proved to be cocaine.

Wendell Tolbert ("Tolbert"), the defendant's seventeen-year-old first cousin, testified that he visited Peterson on 5 January 2000 about 1:30 p.m.; his grandfather drove him there in a white car. Tolbert left the car and knocked on Peterson's door. The defendant walked out of his house and to

the car to speak to his grandfather. Tolbert denied ever handing money to Peterson or receiving cocaine in return.

Peterson testified that he lived alone at 8933 Olive Street at the time he was arrested. He admitted owning a gun in order to protect himself. He explained the money as being part of a loan he had taken out to pay some bills. He claimed that the scale was used during his last semester at Southern University at New Orleans for chemistry class experiments done at home. When asked if the cocaine in the house was his, Peterson admitted that it was, but he denied selling it. He claimed it was for his own use.

ERRORS PATENT

Before addressing Peterson's sole assignment of error, we note two potential errors patent. Under La. R.S. 40:967(B)(4)(b), the five-year sentence must be imposed without the benefit of parole, probation, or suspension of sentence for the first two years. The sentence is therefore illegally lenient. Under La. R.S. 15:301.1, which addresses instances where sentences contain statutory restrictions on parole, probation, or suspension of sentence, paragraph A provides that in cases where the statutory restrictions are not recited at sentencing, they are automatically deemed contained in the sentence, whether or not imposed by the sentencing court.

Moreover, in *State v. Williams*, 2000-1725 (La. 11/28/01), 800 So.2d 790, the Supreme Court has ruled that paragraph A self-activates the correction and eliminates the need to remand for a ministerial correction of an illegally lenient sentence, which may result from the failure of the sentencing court to impose punishment in conformity with that provided in the statute. Hence, this court is not required to take action to correct the trial court's failure to specify that the first two years of the defendant's sentence must be served without benefit of parole, probation, or suspension of sentence because the correction is automatic under *Williams*, *supra*, and La. R.S. 15:301.1.

The second possible error concerns the trial court's ruling on the defendant's oral motion for new trial after sentencing the defendant. Under La. C.Cr.P. art. 852, a motion for a new trial must be in writing and, under La. C.Cr.P. art. 853, a motion for new trial must be filed and disposed of before sentence. Furthermore, La. C.Cr.P. art. 873 requires a twenty-hour delay between the denial of a motion for new trial and sentencing. Because the motion was oral, we conclude that the trial court did not err in failing to rule on the motion before sentencing because the motion was not in writing as required by statute. *State v. Lewis,* 99-3150 (La. App. 4 Cir.2/14/01), 781 So.2d 650, *writ denied,* 2001-0949 (La. 12/14/01), 804 So.2d 629; *State v. Ballom*, 96-1443, p. 2 (La. App. 4 Cir. 7/3/96), 678 So.2d 53, 54-55.

Furthermore, in *State v. Collins*, 584 So. 2d 356 (La. App. 4 Cir. 1991), this Court held that the failure to observe the delay would be deemed harmless error where the defendant did not challenge his sentence on appeal. Therefore, in the present case where no error is raised as to the defendant's sentence, which was the minimum mandated term of five years, the failure of the trial court to observe the delay period is harmless error.

ASSIGNMENT OF ERROR

In a single assignment of error, Peterson complains that the trial court erred when it failed to advise him of post-conviction relief provisions under La. C.Cr.P. art. 930.8; however, this article contains merely precatory language and does not bestow an enforceable right upon an individual defendant. *State ex rel. Glover v. State*, 93-2330, 94-2101, 94-2197, p. 21 (La. 9/5/95), 660 So.2d 1189, 1201, *abrogated in part on other grounds, State ex rel. Olivieri v. State,* 2000-0172, 2000-1767 (La. 2/21/2001), 779 So.2d 735.

In the interest of judicial economy, we note for defendant that La. C.Cr.P. art. 930.8 generally requires that applications for post-conviction relief be filed within two years of the finality of a conviction.

CONCLUSION

For the reasons stated herein, we affirm defendant's conviction and sentence, noting that his sentence is automatically corrected to reflect that the first two years thereof is to be served without the benefit of parole, probation, or suspension of sentence.

AFFIRMED